Supreme Court, U.S.
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No. 99-

In The

Supreme Court of the United States

October Term, 1999

GILBERT COPPER and ADELE NORBERG,

Petitioners,

vs.

CITY OF FARGO, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

THOMAS W. CONDIT
Trial Counsel of Record
Suite C-208
9403 Kenwood Road
Cincinnati, Ohio 45242
(513) 985-9333

PETER B. CRARY
Local Counsel of Record
1201 12th Avenue North
Fargo, North Dakota 58102
(701) 280-9048

Attorneys for Petitioners

8288

QUESTION PRESENTED

Does the separate document requirement of Rule 58 of the Federal Rules of Civil Procedure apply to post-judgment orders intended to commence the appeal periods defined in Rule 4(a)(1) of the Federal Rules of Appellate Procedure?

PARTIES TO THE PROCEEDING

The parties to this Petition are the same parties who were litigants in the appeal decided by the United States Court of Appeals for the Eighth Circuit. They are listed below with their status as designated during the Eighth Circuit proceedings.

Petitioners

Gilbert Copper (Appellee/Cross-Appellant)
Adele Norberg (Appellee/Cross-Appellant)

Respondents

City of Fargo (Appellant)
Kevin Niemann (Cross-Appellee)
Sherri Arnold (Cross-Appellee)

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Petitioners Gilbert Copper and Adele Norberg respectfully request that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is reported at 184 F.3d 994 (8th Cir. 1999) (App. A).

The opinion of the district court in *Copper v. City of Fargo*, Civ. No. A3-93-130 (D.N.D. March 31, 1998) on petitioners' motion for attorney's fees is unreported. The opinion of the district court in *Copper v. City of Fargo*, Civ. No. A3-93-130 (D.N.D. April 10, 1997) on cross-motions for summary judgment prior to the second trial is unreported.

The opinion of the district court on cross-motions for summary judgment entered prior to the first trial is reported at 905 F. Supp. 680 (D.N.D. 1994). The district court's supplemental opinion on municipal liability entered after the first trial is reported at 905 F.Supp. 703 (D.N.D. 1995).

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Eighth Circuit was entered on July 22, 1999. A timely petition for rehearing was denied on August 24, 1999. (App. B). Original jurisdiction in the district court was invoked under 42 U.S.C. § 1983 and 28 U.S.C. § 1331.

The jurisdiction of this court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Set forth in Appendix C are U.S. Const. Amendment I; U.S. Const. Amendment IV; U.S. Const. Amendment XIV, Section I; 42 U.S.C. § 1983; Rule 4 of the Federal Rules of Appellate Procedure; Rules 54(a) and 58 of the Federal Rules of Civil Procedure; and Fargo Municipal Ordinance 10-08.

STATEMENT OF THE CASE

1. Facts Underlying The Constitutional § 1983 Claims.

On August 20, 1991 Petitioners Gilbert Copper and Adele Norberg were arrested while they were lawfully and peacefully picketing in a residential neighborhood in Fargo, North Dakota. Petitioners were arrested by Respondents Kevin Niemann and Sherri Arnold, two police officers employed by Respondent City of Fargo, who charged Petitioners with violating Fargo's residential picketing ordinance. (App. C at 19-20). The subsequent prosecution against the Petitioners in the state courts of North Dakota resulted in the dismissal of charges on constitutional grounds. The state court judge who dismissed the charges specifically found that the Petitioners had been engaged in constitutionally protected picketing under the holding of *Frisby v. Schultz*, 487 U.S. 474 (1988). On August 18, 1993, Petitioners filed a Complaint in the United States District Court for the District of North Dakota seeking damages against the City of Fargo and police officers Niemann and Arnold pursuant to 42 U.S.C. §1983.

2. First Summary Judgment Decision and First Trial.

The District Court dismissed all claims against Arnold on summary judgment in 1994, but concluded that Petitioners' picketing activities were protected by *Frisby* and that their constitutional rights had been violated. However, the District Court also concluded that a single fact issue remained for trial, the resolution of which would determine (1) whether Niemann was entitled to qualified immunity and (b) whether there was municipal liability under § 1983 for the City of Fargo. In January 1995, the disputed issue of fact was tried to a jury, which decided it in a manner which resulted in a defense verdict in favor of the City but a liability verdict against Niemann. The jury then awarded $1.00 in damages to each of the Petitioners.

3. Motion For A New Trial.

Before entering final judgment on the jury verdict, the District Court concluded that it had given an erroneous jury instruction (over Petitioners' objections) which may have unfairly influenced the jury on both the liability and damages issues. On April 11, 1995 the District Court entered a Notice of Intent To Grant A New Trial (App. D), a five page document which fully explained the Court's reasoning and concluded:

The court finds that there are grounds for a new trial and will order a new trial on all issues presented at the first trial unless parties elect to decline the opportunity to retry the case. The parties shall advise the court in writing by May 1, 1995 whether or not they wish to proceed with a new trial.

On May 1, 1995, the District Court entered a Clarification of Intent To Grant A New Trial (App. E), which noted Petitioners' desire:

> not . . . to reopen the issue of liability against Defendant Niemann and intend[ing] instead to move for a new trial limited to damages against defendant Niemann and both liability and damages against the City of Fargo. The court will afford [Petitioners] an opportunity to present such a motion.

The District Court entered final judgment on the Jury Verdict on May 10, 1995 (App. F), after which Petitioners filed a timely Motion For A New Trial And To Alter Judgment on May 22, 1995, asking the District Court for the following (alternative) remedies for retrial:

> 1) Grant summary judgment on liability against all [Respondents] and conduct a new trial limited to the issue of damages;
>
> 2) If the Court is still persuaded that a fact issue remains, grant a *new trial on liability and damages as to [Petitioners] Arnold and the City of Fargo*, and limited to damages against [Respondent] Niemann.

On August 14, 1995, the District Court entered a Memorandum and Order (App. G) a four page opinion which addressed the Petitioners' motion and resolved several other post-trial motions as well. The Court:

> a) Declined to alter the judgment by revising its earlier summary judgment rulings;

b) Denied Petitioners' request for a new trial on *damages only* against Niemann;

c) Stated that it had already ordered a new trial on terms different than those requested by Petitioners;[1] and

d) Granted Petitioners' motion for an extension of time to file an Attorneys' Fee application until 20 days after final judgment was entered after "retrial".

4. Second Summary Judgment Decision and Second Trial.

Before retrial, the United States Court of Appeals for the Eighth Circuit decided *Veneklase v. City of Fargo*, 78 F.3d 1264 (8th Cir. 1996) and *Kirkeby v. Furness*, 92 F.2d 655 (8th Cir. 1996), relevant intervening cases which led the District Court to permit the parties to renew motions for summary judgment. On April 10, 1997, the District Court entered a Memorandum and Order granting summary judgment in Niemann's favor (based on *Veneklase*) but in Petitioners' favor against the City (based on *Kirkeby*). This is what the District Court said about its prior orders as it

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[1] This characterization by the district court is not exactly accurate. A closer look reveals that what the district court always intended (i.e., a new trial on liability and damages) is exactly what the petitioners sought against the City of Fargo as an alternative ground for relief in their post-trial motion. It is more accurate to say that Petitioners' motion for a new trial was granted in part and denied in part.

reviewed the history of this case in that summary judgment order:

Following the Jury's verdict, this court vacated the jury's findings and ordered a new trial, on both liability and damages issues, because the court found that the "Mitigation of Damages" Instruction and defendants' counsel's closing argument were misleading to the Jury.

A second trial (limited to damages against the City) was conducted in August 1997. The jury awarded damages in the amount of $2,150.00, and the district court later awarded attorneys' fees ($67,305.00) and costs ($2,097.94) to Petitioners. (App. H). In its Memorandum and Order awarding attorney's fees, the court stated:

> Following the jury verdict [in the first trial], this court vacated the jury's findings and ordered a new trial because the court found that one of its jury instructions and defense counsel's closing argument relating to that instruction were misleading to the jury.

The City of Fargo appealed and Petitioners cross appealed against the police officers.

5. Jurisdictional Issue Raised For First Time On Appeal in City of Fargo's Opening Brief.

Although the City never once suggested in the district court that the second trial was jurisdictionally defective, it raised this issue for the first time in its appeal brief filed in the Eighth Circuit on July 22, 1998. On August 5, 1998, Petitioners filed a motion for partial remand under Civil Rule 60(a) so that the District Court would have the opportunity to

correct its "oversight or omission" of failing explicitly to order a new trial. The motion for partial remand was essentially ignored by the Eighth Circuit.

On July 22, 1999 an Eighth Circuit panel entered an opinion (App. A) holding that the District Court had never ordered a new trial, that the August 14, 1995 Order was a denial of Petitioners' motion for a new trial, that a separate document under Civil Rule 58 was not required for disposing of such a post-trial motion, and that the District Court's jurisdiction had ended when there was no appeal from the August 14, 1995 Order.

On August 5, 1999, Petitioners filed a Petition For Rehearing with Suggestion For Rehearing En Banc. The Petition was denied per Eighth Circuit Order dated August 24, 1999. (App. B).

6. Comment on Lower Court Decisions

Several comments are necessary to give full context to what happened below, notwithstanding the narrow issue presented in this Petition.

A. The District Court's Orders

The District Court erred only to the extent that its orders regarding a new trial, taken as a whole, carried a degree of ambiguity. The District Court's entries stated its intention to grant a new trial (April 11, 1995) (App. D) and clarified that intention (May 1, 1995) (App. E) prior to entering final judgment (May 10, 1995) (App. F) on the first jury verdict. The problem arose with the Court's Memorandum and Order (August 14, 1995) (App. G) deciding Petitioners' timely

motion for a new trial, which stated (as did several later opinions) the District Court's belief that it had *already* ordered a new trial. What was lacking was an order stating that the Court "is hereby ordering" a new trial, although no one seemed misled by that omission. Indeed, all of the parties litigated the case for two more years until a second trial took place in August 1997.

Moreover, there was no error in the District Court's failure to enter a "separate document" under Civil Rule 58, because clearly the Court did not consider the case to be over. What other conclusion is possible from the District Court's grant of Petitioners' motion to defer an attorney fee application until after "retrial"?

B. The Eighth Circuit's Decision

The Eighth Circuit's decision is far more troublesome and misleading. Within two weeks of first being confronted by the jurisdictional challenge appearing in the City of Fargo's appeal brief in July 1998, Petitioners filed a Motion For Partial Remand under Civil Rule 60(a) so that the District Court could correct' its "oversight or omission"; *i.e.*, its failure to order (in the present tense) the new trial which everyone knew was intended. Petitioners provided the Eighth Circuit with ample precedent for such a remand and there is no doubt what the District Court would have done given that opportunity. The Eighth Circuit considered the motion for nearly four months before deferring a ruling and taking the motion under submission to be heard with the merits of the case at oral argument. However, at oral argument the panel was unaware that such a motion had ever been filed. Even after the motion was physically displayed by counsel at oral argument, the panel published an opinion without ruling on

the motion and, worse yet, suggesting that the remand issue was only raised at oral argument.

There are other mischaracterizations in the Eighth Circuit opinion which need not be detailed here. All of this procedural confusion circles back to the subject of this Petition: the need to observe the separate document requirement of Civil Rule 58 when entering post-trial orders intended to commence the appeal periods defined in Appellate Rule 4(a)(1).

The Eighth Circuit below disposed of this issue as follows:

> The plaintiffs further argue that the district court's order of August 14, 1995 does not constitute a final appealable order due to noncompliance with Rule 58 of the Federal Rules of Civil Procedure. Rule 58 requires for entry of a final judgment, the entry of a separate document, and notation in the docket by the district court clerk. The plaintiffs' argument fails because the denial of a motion for a new trial leaving the old judgment unaffected does not fall under Rule 58. See Marre v. United States, 38 F.3d 823, 825 (5th Cir. 1994). The district court is not required to issue a new judgment or enter a separate written order. Id. On May 10, 1995, the district court signed a document entitled "Judgment" and the Clerk of the United States District Court of the District of North Dakota entered the "Notice of Entry of Judgment" that same day. Thus, the district court followed the requirements of Rule 58.

(App. A at 8).

REASONS FOR GRANTING THE WRIT

The primary reasons for granting the writ go to the core of this Court's certiorari jurisprudence: (1) the issue presented is an important question of federal law, and (2) a significant split of authority exists in the federal circuits. Supreme Court Rule 10(a) & (c). As noted by a leading commentator: "The caselaw is in disarray on how the requirement of entry on a separate document is to be applied in the context of postjudgment motions." 16A Charles Alan Wright, Arthur R. Miller and Edward H. Cooper, Federal Practice and Procedure § 3950.2, p. 122 (1999).

I. Important Question of Federal Law.

A. There is a compelling need for the uniform application of the Rule 58 separate document requirement to all orders which commence the time for appeal.

This Court has not previously addressed the specific question of the application of the Rule 58 separate document requirement to post-judgment orders, "an important question of federal law that has not been, but should be, settled by this Court," Supreme Court Rule 10(c), and which reflects splintered disagreement between the circuits. *Id.*, Rule 10(a). Just as "a direct conflict over the interpretation of the Rules of Appellate Procedure calls for resolution in this Court," *Acosta v. Louisiana Dept. of H. & H. Res.*, 478 U.S. 251, 253 (1986), so does a direct conflict over the Rules of Civil Procedure. "[S]urely such a commonplace affair as the time for appeal should not be permitted to breed litigation." *United States v. Schaefer Brewing Co.*, 356 U.S. 227, 251 (1958) (Harlan, J., dissenting).

> A conflict on an issue such as this is of importance and concern to every litigant in a federal court, since, as this case makes clear, the timeliness of appeals, as well as the timeliness of post-trial motions, may turn on the question of when judgment is entered.

United States v. Indrelunas, 411 U.S. 216, 218 (1973).

> These issues are of some importance to both appellants and the federal courts as the described omissions [failure to create separate document and enter it in the docket] may result in unnecessary confusion, inefficient marshalling of judicial resources, and, most important, delays in obtaining or, possibly, actual loss of the right to, appellate review. While it cannot be said that these omissions occur on a daily basis, their regularity, the mischief they may cause, and the inconsistent treatment they have received by the courts and commentators, suggest that a clear and cogent resolution is needed.

Michael Zachary, *Rules 58 and 79(a) of the Federal Rules of Civil Procedure: Appellate Jurisdiction and the Separate Judgment and Docket Entry Requirements*, 60 N.Y. Law. School. L.R. 409, 409 (1996).

Two Circuit Courts of Appeal have appointed highly qualified amici curiae to argue this critical jurisdictional question that governs the timeliness of appeals. The First Circuit appointed Hill and Barlow Senior Counsel Gael Mahony and Harvard Law Professor David Shapiro to advise it on the matter in *Fiore v. Washington County Corn. Mental*

Health Ctr., 960 F. 2d 229 (lst Cir. 1992) (en banc).[2] The D.C. Circuit appointed Deanne Maynard as amicus curiae to represent an appellant before the court for purposes of briefing and arguing this issue in *U.S. v. Haynes*, 158 F.3d 1327 (D.C.Cir. 1998).[3]

The quality of the amici appointed is indicative of the importance attached to this issue. This Court has recognized "the public importance of the proper interpretation and uniform application of the provisions of the Federal Rules governing the time within which appeals may be taken[.]" *United States v. Schaefer Brewing Co.*, 356 U.S. at 230. As the D.C. Circuit has stated: "[T]he [Rule 58] issues raised in this matter are recurring and are important for the sound and orderly administration of justice in this District." *Diamond by Diamond v. McKenzie*, 770 F.2d 225, 226 (D.C.Cir. 1985). A leading commentator agrees that the rules on entry of post-judgment orders, being jurisdictional, "should be bright

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[2] From 1984 to 1991 Mr. Mahony served on the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States. He was appointed by Chief Justice Warren Burger. Professor Shapiro teaches civil procedure at Harvard Law School and has been a tenured faculty member there since 1966.

[3] Deanne Maynard has been editor of the Harvard Law Review and served as Law Clerk to United States Supreme Court Justice Stephen G. Breyer in the 1994 term. Assisting her in this assignment were Ian Gershengorn and Ann Kappler. Mr. Gershengorn was a member of the Harvard Law Review and served as Law Clerk to United States Supreme Court Justice John Paul Stevens in the 1994 term. Ann Kapler was editor-in-chief of the New York University Law Review and served as Law Clerk to United States Supreme Court Justice Harry A. Blackmun during the 1987 term. Biographical information is found under Attorney Profiles at <http://www. martindale.com>.

and clear so that there is no uncertainty about when the time begins to run." 16A Wright, Miller and Cooper, Federal Practice and Procedure § 3950.2, p. 128 (1999).

B. Mechanical application of the Rule 58 separate document requirement to all orders intended to commence the appeal periods defined in Appellate Rule 4(a) is required by the text of the Civil and Appellate Rules and is supported by this Court's prior holdings.

Rule 58, Fed. R. Civ. P., states in part: "Every judgment shall be set forth on a separate document. A judgment is effective only when so set forth and when entered as provided in Rule 79(a)." Rule 54(a) states in part: "'Judgment' as used in these rules includes a decree and any order from which an appeal lies."

This interplay between Civil Rules 54(a) and 58 should alone suffice to establish the requirement of a separate document even for the denial of a post-trial tolling motion. It appears, however, from some of the circuit case law discussed below that semantical differences have unnecessarily confused the issue.

Simply stated, the problem is this. Some courts construe an order denying a post judgment motion for a new trial to be a new final (appealable) judgment which must conform to the Rule 58 requirement. Other courts construe it to be a non-appealabale order which has the *effect* of restarting the appeal clock on the original appealable final judgment, and which therefore does not require a Rule 58 separate

document. Still other courts have unclear or inconsistent positions.

Fortunately, this Court can end the debate without wading into that semantical difficulty merely by clarifying and imposing a uniform application of Rule 4, Fed.R.App.P., which already answers the question.

> Rule 4(a) of the Federal Rules of Appellate Procedure establishes . . . that a judgment is considered entered for purposes of the Rule only if it has been entered in compliance with Rule 58 of the Federal Rules of Civil Procedure.

Shalala v. Schaefer, 509 U.S. 292, 302 (1993). Rule 4(a)(7) of the Appellate Rules, upon which the Court relied in making this statement, *id.*, applies also to post-trial orders.

When a motion for new trial is timely filed, the time to file an appeal from the judgment runs from "entry of the order" disposing of the motion. Rule 4(a)(4), Fed.R.App.P.

> **Entry Defined.** A judgment or order is entered for purposes of this Rule 4(a) when it is entered in compliance with Rules 58 and 79(a) of the Federal Rules of Civil Procedure.

Rule 4(a)(7), Fed.R.App.P. According to the plain language of Appellate Rule 4(a)(7), Rule 58 must be observed in the entry of an order denying a new trial motion to commence the time to appeal the judgment itself. "Rule 4(a) therefore expressly imposes Rule 58's separate document requirement on denials of motions made under Rules 50(b), 52(b), and

59(b) and (e)." *Fiore v. Washington County Com. Mental Health Ctr.*, 960 F.2d at 233.[4]

Although a formal separate document is not required for an order or judgment to be appealable, *Shalala* at 303, citing waiver rule of *Bankers Trust Co. v. Mallis*, 435 U.S. 381 (1978) *(per curiam)*, observance of Rule 58 is necessary for the jurisdictional time limits of Appellate Rule 4 to begin running. In the absence of a Rule 58 conforming judgment or post-trial order, a potential appellant does not waive his opportunity to appeal, nor is the case final. "[A] party need not file a notice of appeal until a separate judgment has been filed and entered." *Mallis* at 385. Rule 58 must be "mechanically applied," and may not be modified through "case-by-case tailoring[.]" *Indrelunas* at 221-222. "[Rule 58] should be interpreted to prevent the loss of the right of appeal, not to facilitate loss." *Mallis* at 386, quoting 9 J. Moore, Federal Practice §110.08[2], p.120 n.7 (1970).

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[4] Prior to the adoption of the language of current Appellate Rule 4(a)(7), the previous Appellate Rule 4(a)(6) defined entry of a judgment or order as entry "in the civil docket." The sentence was amended in 1979 "to call attention to the requirement of Rule 58 of the F.R.C.P. that the judgment constitute a separate document." Advisory Comm. Notes to 1979 Amendment, Rule 4(a)(6). *See* Zachary, *Rule 58 and 79(a)*, 60 N.Y.Law.School.L.R. at 414 n.19 for further citations and analysis. Since 1979, the express language of Appellate Rule 4 makes Civil Rule 58 as applicable to post-judgment orders which restart the appeal clock as to judgments themselves. "The time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion[.]" Appellate Rule 4(a)(4)(A). "Entry" by definition requires compliance with Rule 58. Appellate Rule 4(a)(7). Civil Rule 58 requires that the judgment or order in question must be set out in a "separate document . . distinct from any opinion or memorandum" that supports it. Advisory Comm. Notes to 1963 Amendment, Rule 58.

II. Conflict in the Circuits

The holding of the Eighth Circuit in the opinion below, relying on Fifth Circuit precedent, is in flat contradiction to leading cases in the First Circuit and D.C. Circuit. This conflict is not an isolated one, but reflects a general confusion throughout the federal circuits.

A. Circuits which apply the separate document requirement of Rule 58 to denial of post-judgment tolling motions.

The following circuits apply the separate document rule correctly to all post-judgment orders that begin anew the time for appeal.

1. First Circuit

"By far the most comprehensive examination of the requirement of a separate document for postjudgment motions, dealing both with denials and grants of those motions, is by the First Circuit sitting en banc in Fiore v. Washington County Community Health Center [960 F.2d 229 (1992)]." 16A Wright, Miller and Cooper, Federal Practice and Procedure § 3950.2, pp. 127. Although *Fiore* reviewed the practice of making a marginal notation on a photocopy to dispose of a post-trial motion, the court made it clear that a combined opinion and order also failed to satisfy Rule 58. *Fiore* at 235, n.9.

The court held that:

> Any order denying (as well as granting) post-judgment motions under Rules 50(b), 52(b),

> 59(b) and (e), and 60(b) of the Federal Rules of Civil Procedure must be set forth on a "separate document."

Id. at 239.

In its analysis the court noted the clear language of Rule 4(a)(7), Fed.R.App. P., and stated: "Rule 4(a) therefore expressly imposes Rule 58's separate document requirement on denials of [Rule 4(a)(4)] motions." *Fiore* at 233. Reaffirming that the purpose of Rule 58 is to make clear when the time for appeal starts, the court stated: "Logically, then, the rule should be applied to the specific order that starts the clock running. Without consistent application of this formality, there would be no unambiguous signal that the time for appeal has begun to run." Such language collides with the Eighth Circuit position in this case that the Rule 58 requirement changes depending on whether or not the original judgment is changed by the post-trial order. As the First Circuit stated:

> [T]he separate document setting forth the original judgment is of no help in determining the precise date on which the time to appeal begins to run. The significant date is the date of the order denying the motion. Because Rule 58's purpose is to ensure that that date is precisely clear, the separate document requirement must apply to such orders.

Id. at 234.

The First Circuit's position is in accord with the text of the civil and appellate rules as well as *Indrelunas'* repudiation of "case-by-case tailoring" of Rule 58.

> [C]onsistency and clarity are better achieved by following the rules as they are written than by trying to draft a set of exceptions or by making efforts to distinguish one type of judgment or order from another. Accordingly, we accept amici's recommendation that we adopt a uniform approach applying Rule 58 to all final orders denying *and, a fortiori,* granting post-judgment motions under Rules 50(b), 52(b), 59(b) and (e), and 60(b).

Fiore at 234.[5]

2. D.C. Circuit

In *Diamond by Diamond v. McKenzie,* 770 F.2d 225 (D.C.Cir. 1985), the court noted that "a combined decision and order" does not satisfy Rule 58. *Id.* at 230, n.10. Chief Judge Robinson, concurring, stated: "Rule 58's separate-document requirement bears vitally on the timeliness of post-judgment motions and appeals." *Id.* at 231.

In *U.S. v. Haynes,* 158 F.3d 1327 (D.C.Cir. 1998), the court applied this reasoning and the related "separate document" analysis to orders on Rule 60(b) post-judgment motions. *Id.* at 1328. The appellee argued that the original final judgment was the only separate document needed and that any other approach would create "a boon for tardy

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[5] Having adopted a blanket rule, the First Circuit then carved out an exception, inferring finality if a motion for entry of judgment is not made within three months of the order in question. *Fiore* at 236. No court or commentator who has addressed the question agrees with *Fiore*'s three-month limit on appealability and this case presents a perfect example of why it is unworkable.

appellants." *Id.* at 1329. The court made short work of these arguments.

> These objections do not come within a country mile of the sort of incoherence or inconsistency in the literal language of the rules that . . . would allow a court to go beyond the rules' plain meaning.

Id. (citation omitted). The separate document requirement, the court stated, "is as clarifying in the one context as in the other." *Id.* The court "left for another day" the issue of the relationship of Rule 4(a)(4) tolling motions to Rule 58, but did "note in this connection that Fed.R.App.P. 4(a)(7) provides that judgments or orders are deemed entered under Rule 4 only when entered in compliance with Fed.R.Civ.P. 58." *Id.* at 1330. The court allied itself with the First Circuit's decision in *Fiore* but held that the *Fiore* three-month limit on appealability did not apply. *Id.* at 1330-1331.

Finally, the court rejected the contention that the district court's three-page "Memorandum Opinion and Order" qualified as a separate document under Rule 58. "In light of *Diamond by Diamond*, we think it understandable that the government found itself speechless when invited at oral argument to explain how, if Rule 58 applied, the Memorandum Opinion & Order could be thought to qualify." *Id.* at 1331.

3. Tenth Circuit

The Tenth Circuit has adopted in an unpublished opinion the First Circuit's position in *Fiore* that the separate document requirement is applicable to all judgments or orders that start the appeal clock. In *Woods v. Wal-Mart*, 124

F.3d 219 (10th Cir. 1997) (table), the court stated that "orders containing neither a discussion of the court's reasoning nor any dispositive legal analysis can act as final judgments[.]" The Tenth Circuit stated further:

> There is some controversy whether Rule 58 even applies to orders denying post-judgment relief. *Compare Fiore v. Washington County Community Health Ctr.*, 960 F.2d 229, 232-34 (1st Cir. 1992) (citing text and policy to apply rule), with *Chambers v. American Trans Air, Inc.*, 990 F.2d 317, 318 (7th Cir. 1993) (relying on analysis of post-judgment context to hold rule inapposite). But we have applied it to the denial of a new trial motion, *see Allen v. Horinek*, 827 F.2d 672, 673 (10th Cir. 1987), and, "[b]ecause the underlying principles are closely analogous," there is good reason "to adopt a uniform approach for all orders denying post-judgment motions." *Fiore*, 960 F.2d at 232.

Woods v. Wal-Mart, *supra*, n.3.

B. Circuits which do not apply the separate document requirement of Rule 58 to denial of post-judgment tolling motions.

In addition to the Eighth Circuit, the following courts of appeal do not require entry of a separate document upon denial of a post-trial tolling motion.

1. Fifth Circuit

In *Marre v. United States*, 38 F.3d 823, 825 (5th Cir. 1994), the district court disposed of a post-trial tolling motion

by "a written minute entry that was entered in the docket, but did not issue a written order denying the motion." *Id.* While acknowledging that "Rule 58 clearly requires the entry of a separate, written order," *id.*, the *Marre* court followed three other circuits in holding that denials of post-trial motions (as opposed to grants of such motions), do not require a separate, written order. "The Seventh, Ninth and Eleventh Circuits . . . do not require a separate, written order for the denial of a post-trial motion." *Id.*

2. Seventh Circuit

In *Charles v. Daley*, 799 F.2d 343 (7th Cir. 1986), the court stated: "A minute order suffices when the judge denies a request to alter the judgment, for then the original judgment remains in effect." *Id.* at 347. When the judgment changes as a result of a post-trial motion, however, the appeal time is suspended "until the effective judgment is set forth on a separate sheet of paper." *Id.* The Seventh Circuit has approved this reasoning in subsequent cases. *See Wikoff v. Vanderveld*, 897 F.2d 232, 236 (7th Cir. 1990). In *Chambers v. American Trans Air, Inc.*, 990 F.2d 317, 318 (7th Cir. 1993), the Seventh Circuit noted its conflict with the First Circuit.

> There is no requirement in this circuit that the order denying the motion comply with Rule 58. [citations omitted]. The qualification "in this circuit" is important, because the First Circuit, in a recent en banc opinion, concluded after careful examination of the issue that Rule 58 applies to all appealable orders, including post-judgment orders. *Fiore v. Washington County Community Mental health Center*, 960 F.2d 229 (1st Cir. 1992) (en banc).

3. Eleventh Circuit

The issue in *Wright v. Preferred Research, Inc.*, 937 F.2d 1556 (11th Cir. 1991), was whether an amended judgment had to comply with Rule 58 and be entered on a separate document from the original judgment. The court decided to take "a practical, common sense approach" to this question, thus freeing itself from the mechanical strictures of Rule 58. *Id.* at 1560. The court ruled that even when a post-trial motion was granted and the judgment altered, the new judgment did not have to be set out on a separate document of its own. The "best choice," the court said, is to require "no second document when a district court amends a judgment." *Id.* at 1560-61. Though the court acknowledged that requiring a new separate document for all changes in a judgment might enhance certainty "that the time for appeal has begun to run anew," it balked at taking this step.

> The logical extension of that reasoning, however, is that Rule 58 requires a new separate document even when the district court *denies* a post-judgment motion, since such a requirement would provide a signal that the time for appeal has begun to run again. This interpretation goes far beyond the scope and purpose of Rule 58 and we decline to adopt it.

Id. at 1560.

C. Circuits which have not taken a position on application of the Rule 58 separate document requirement to denial of post-judgment tolling motions or which have inconsistent precedent on the question.

1. Second Circuit

In RR *Village Ass'n, Inc. v. Denver Sewer Corp.*, 826 F.2d 1197 (2nd Cir. 1987), the district court, in response to a post-judgment motion, vacated its original judgment for defendants and entered a second Memorandum-Decision favoring the plaintiffs. Three weeks later the court entered judgment on its second Memorandum-Decision. The appeal question was whether the appeal time ran from the second Memorandum-Decision or from the subsequent judgment. *Id.* at 1200. In discussing the application of Rule 58 to the grant of a post-judgment motion, the court stated its result in terms that applied to all post-judgment tolling motions.

> Thus, under Fed.R.App.P. 4(a)(6), an order disposing of a motion under Fed.R. Civ. P. 59 is not effective until set forth on a separate document.
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> Although a one-sentence order denying a motion satisfies the separate-document requirement, an order that is part of a district court opinion or memorandum does not.

Id. at 1201. However, the Second Circuit's position is less clear after *Cooper v. Town of East Hampton*, 83 F.3d 31, 35 n.3 (2d Cir. 1996) ("We express no view as to the application

of the separate document requirement of Rule 58 to post-judgment rulings.")

2. Third Circuit

The Third Circuit has not addressed the question of Rule 58 in the post-judgment context either directly or by implication through decision in a particular case. However, it did hold in the context of an original judgment that a four-page document entitled "Memorandum Opinion and Judgment," failed to satisfy Rule 58's separate document requirement. *Gregson v. Government of the Virgin Islands*, 675 F.2d 589 (3rd Cir. 1982). Because the 30-day appeal time never began to run, "the notice of appeal cannot be untimely." *Id.* at 593.

3. Fourth Circuit

The Fourth Circuit appears to agree with the Petitioners' position in practice without actually saying so. The Fourth Circuit may indeed be better characterized with the First and D.C. Circuits. In *Hughes v. Halifax County School Board*, 823 F.2d 832 (4th Cir. 1987), the district court had entered an order combining a four-page discussion of a post-trial motion with a judgment disposing of all claims in the case. Without articulating a distinction between the application of Rule 58 in the judgment and post-judgment contexts, the Fourth Circuit found that the district court's post-trial order violated the "strict standard" of Rule 58. *Id.* at 835.

> In applying the Rule 58 requirement to a given situation, the form and content of the document at issue are determinative. Brevity is an important factor:

> an order unaccompanied by a long explanation is likely to be considered a "judgment."
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> By contrast, a document which attempts to combine the court's reasoning and its final disposition is not likely to be considered a "separate document" under Rule 58.
>
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>
> The mere fact that the district court used the term "judgment" repeatedly on the last page of the order is not dispositive.

Id. See also Barber v. Whirlpool Corp., 34 F.3d 1268 (4th Cir. 1994) (11-page document, last page of which was an order dismissing post-trial motions, did not comply with Rule 58 and thus did not trigger appeal time).

4. Sixth Circuit

In *Stern v. Shouldice*, 706 F.2d 742, 746 (6th Cir. 1983), the court recognized that according to then appellate rule 4(a)(6), Rule 58's separate document requirement applied to orders on post-judgment tolling motions. The appeal time ran from the judgment entered on the post-trial motion and not from an earlier-filed opinion. In *Cloyd v. Richardson*, 510 F. 2d 485 (6th Cir. 1975), the court stated that a combined "Judgment and Order" containing the court's findings and reasonings did not comply with Rule 58. However, it is also the position of the Sixth Circuit that the separate document rule is a "mere technicality" when "appellant was not misled by the failure to enter a separate judgment." *Amoco Oil Co., v. Jim Heilig Oil & Gas, Inc.*, 786 F. 2d 1163 (6th Cir. 1986), *cert. denied*, 479 U.S. 966. This "case-by-case tailoring" of Rule 58 contradicts *Indrelunas* and is contrary to the *Mallis*

teaching that Rule 58 is always applied to save appeals, not to forfeit them. *See Amoco Oil, supra,* (Blackmun, J., dissenting from denial of certiorari).

5. Ninth Circuit

"Wherever the rules establish a time requirement that limits a litigant's ability to obtain relief from a final judgment, it is imperative that the court provide a clear signal that the time period within which that relief can be sought has begun to run." *Carter v. Beverly Hills Say. & Loan Ass'n,* 884 F.2d 1186, 1189 (9th Cir. 1989). Ironically, Ninth Circuit case law has failed to do this.

In *Hard v. Burlington Northern Railroad* Co., 870 F.2d 1454 (9th Cir. 1989), the court examined the timeliness of an appeal from a "Memorandum and Order" denying a motion for a new trial. Even though the notice of appeal was filed 33 days after the "Memorandum and Order" was entered, the Ninth Circuit held that the appeal was timely.

> In the present case the order of the district court denying the appellant's motion for a new trial was contained in the last sentence of a nine page memorandum. We agree with the Fourth Circuit that "an order . . . tacked onto the end of an opinion, no matter how explicit, simply does not qualify as a separate document for the purpose of evaluating the timeliness of an appeal." *Caperton v. Beatrice Pocohantas Coal* Co., 585 F.2d 683, 689 (4th Cir. 1978). Consequently, the trial court's order was not entered within the meaning of Rule 4(a)(4), and Hard's appeal was timely filed.

Id. at 1458.

A mere six months later, however, a different panel, without mentioning *Hard*, abandoned the separate document requirement for orders denying post-judgment motions. In *Hollywood v. City of Santa Maria*, 886 F.2d 1228 (9th Cir. 1989), the notice of appeal was filed more than a year after the denial of the motion for new trial. The district court had filed a document entitled "Order Denying Plaintiffs New Trial Motion," a nine-page explanatory opinion with a one-sentence order denying the motion tacked onto the end of the opinion and not entered as a separate document. *Id.* at 1230. The court agreed that "the separate entry requirement of Rule 58 applies to orders denying Rule 59 motions," *id.* at 1231, but then disagreed that application of Rule 58 to post-judgment orders required the opinion and the order to be in separate documents. Despite the clear language of the Advisory Committee Note to the 1963 amendments to Rule 58, which the panel quoted, it found that a combination opinion and order was not insufficient in the post-judgment context "simply because the order contains explanatory material." *Id.*

The court distinguished Rule 58 in the final judgment vs. post-judgment context as follows:

> In the context of final judgments, the requirement that the dispositive document be distinct from any opinion serves to eliminate confusion as to which order ends the litigation.
>
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>
> No comparable risk of confusion exists with respect to an order denying a motion for new trial where the order is properly entered on the docket sheet.

Id. at 1232. Thus, the court abandoned mechanical application of Rule 58 in the post-judgment context.

A leading commentator cites the inconsistency between *Hard* and *Hollywood* as one illustration of "disarray" in the case law "on how the requirement of entry on a separate document is to be applied in the context of postjudgment motions." 16A Wright, Miller and Cooper, Federal Practice and Procedure § 3950.2, p. 122 (1999).

III. Guiding Principles

This case is a poster child for the "disarray" and "confusion" in the lower courts on the application of the separate document requirement of Rule 58 to post-judgment orders, and provides the perfect vehicle for eliminating all existing ambiguities about the procedural requirements for entry of post-judgment orders which begin anew the time for appeal.

> The relative simplicity of [a procedural rule] is one of its virtues. It is of first importance to have a definition that will not invite extensive threshold litigation over jurisdiction, although the resulting differentiations of treatment appear somewhat arbitrary. Jurisdiction should be as self-regulated as breathing[.]

Navarro Savings Ass'n v. Lee, 446 U.S. 458, 464 n.13 (1980) (citations and quotation marks omitted).

> The late Professor Zechariah Chafee, Jr., of the Harvard Law School, thought that questions of jurisdiction should be consistent with "the Bright Line Policy." "The boundary between judicial power and

> nullity should * * * be a bright line, so that very little thought is required to enable judges to keep inside it." The rules on the time for appeal are jurisdictional. They should be bright and clear so that there is no uncertainty about when the time begins to run. The rules announced in Fiore, requiring a separate document in every case where an appeal may be taken, have that virtue, and they also have the virtue that they are not burdensome. It is not hard to prepare a separate document, and once it is known that this is always required, it can be done quite mechanically.

16A Wright Miller and Cooper, Federal Practice and Procedure § 3950.2, p. 128 (1999). *See also Moore's Federal Practice*, § 58.05[2] at 58-63 & n.23 (1991) (When a post-judgment motion is denied, "the better practice would be to follow the separate document requirement . . . .").

When a court issues a combined memorandum and order to resolve a post-trial motion, it is and should be a signal to the litigants that the case is not over. Likewise, when the court issues a post-trial order in a separate document apart from its reasoning or analysis, the litigants are properly on notice that the time for appeal has commenced. This "bright line" rule, required by the language of Appellate Rule 4, supported by the cogent analysis of *Fiore and Haynes*, and recommended by Wright, Miller and Cooper, should be unambiguously imposed by this Court as a strict requirement for all post-trial orders intended to commence the appeal periods defined in Appellate Rule 4(a)(1). As this Court stated in 1973: "[T]he separate document provision of Rule 58 is . . . a mechanical change that must be mechanically applied". *United States v. Indrelunas*, 411 U.S. at 221-22 (citation and quotation marks omitted).

IV. Conclusion

Because (1) the issue of the application of Civil Rule 58 to post-judgment orders is one that affects almost all litigants in federal court and (2) the circuits are in "disarray" and "confusion" on this question, the petition for writ of certiorari should be granted in the interest of providing uniform procedural direction for measuring the timeliness of appeals in the federal court system.

Respectfully submitted,

THOMAS W. CONDIT
Trial Counsel of Record
Suite C-208
9403 Kenwood Road
Cincinnati, Ohio 45242
(513) 985-9333

PETER B. CRARY
Local Counsel of Record
1201 12th Avenue North
Fargo, North Dakota 58102
(701) 280-9048

Attorneys for Petitioners

APPENDIX

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT FILED JULY 22, 1999

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

Nos. 98-2144/2416

Gilbert Copper, Adele Norberg,

Cross-Appellants/Appellees,

v.

City of Fargo,

Appellant/Cross-Appellee,

Sherri Arnold, Kevin Niemann,

Defendants.

Appeals from the United States District Court
for the District of North Dakota.

Submitted: May 13, 1999
Filed: July 22, 1999

Before McMILLIAN, BRIGHT, and FAGG, Circuit Judges.

PER CURIAM.

In 1991, police arrested Gilbert Copper and Adele Norberg for unlawful picketing of an individual's dwelling in the City of Fargo, North Dakota, in violation of a 1985 city ordinance. That ordinance provides that "[n]o person shall engage in picketing of the dwelling of any individual in the City of Fargo." Litigation over the arrest and overnight incarceration of Copper and Norberg began in the federal courts in August of 1993 and has continued until disposition of this appeal. The district court[1] conducted two trials. In the first trial, which concluded with a judgment entered on May 10, 1996, Copper and Norberg recovered a judgment of one dollar ($1.00) each against Fargo Police Officer Kevin Niemann but suffered a dismissal of their claims against the City of Fargo. In the second trial, the plaintiffs recovered compensatory damages against the City of Fargo of $2,150.00 in a judgment entered September 8, 1997. The court awarded attorneys' fees of more than $67,000.00 in favor of the plaintiffs.

Much of the work of the trial court and counsel for both parties is for naught. The trial court and the parties participated in a new trial on liability and damages. However, the trial court never in fact ordered a new trial. Thus, only the judgment in the first trial will be enforced and all proceedings after September 12, 1995, including the second jury trial, are vacated as outside the jurisdiction of the district court.

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[1] A United States Magistrate Judge for the District of North Dakota presided with the consent of the parties. See 28 U.S.C. § 636(c).

I. BACKGROUND

On August 20, 1991, the plaintiffs, Gilbert Copper and Adele Norberg, and others paraded and picketed in South Fargo in the vicinity of the dwelling of a person alleged to be a spokesperson for an organization that provides abortion services in the City of Fargo. After receiving a report that a physical altercation between neighborhood residents and the picketers had occurred, Fargo Police Officers Kevin Niemann and Sherri Arnold arrived on the scene. After warning the picketers that they would be arrested for violating the City of Fargo's home picketing ordinance if they did not leave the neighborhood, the police arrested some of the picketers for violating the ordinance. Copper and Norberg were held overnight in jail and the City of Fargo filed charges against them in Cass County District Court for violating the City of Fargo's home picketing ordinance. On February 18, 1992, the Honorable Frank L. Racek dismissed the charges, concluding that the ordinance was constitutional on its face, but unconstitutional as applied to Copper, Norberg and the other picketers arrested on August 20, 1991.

On August 18, 1993, Copper and Norberg (hereinafter "plaintiffs") brought an action against the City of Fargo and Fargo Police Officers Arnold and Niemann. Plaintiffs sought damages for alleged violations of their constitutional rights of speech and assembly based on unconstitutional enforcement of the City of Fargo's home picketing ordinance. On December 30, 1994, the district court dismissed the plaintiffs' federal constitutional claims against Officer Arnold and the plaintiffs' state law claims against all defendants. The district court determined that a fact issue existed as to whether Officer Niemann was aware, at the time of the arrest, of the scope and distance of the plaintiffs' route. After a jury trial on

January 10-13, 1995, the jury found the plaintiffs failed in their burden of proof against the City. The jury also found that Officer Niemann failed to establish his qualified immunity defense and awarded Copper and Norberg damages in the amount of $1.00 each against Officer Niemann.

On April 11, 1995, the district court issued a notice of intent to grant a new trial stating that the court found that its mitigation instruction may have misled the jury and combined with the "defendants' closing argument [was] clearly injurious to plaintiffs' case and so prejudicial as to warrant retrial of both the liability and damages issues presented at the first trial." Jt. App. at 144. The court concluded it would wait to enter judgment until the parties advised the court whether they wanted to proceed with a new trial. On May 1, 1995, the district court issued a clarification of its notice of intent to grant a new trial indicating that the district court would give the parties an opportunity to submit motions as to whether a new trial limited to damages against defendant Niemann, and both liability and damages against the City of Fargo should be granted. In that notice, the court also indicated that it would enter judgment on the jury's verdict from the first trial on May 10, 1995.

On May 10, 1995, the district court entered a final judgment pursuant to the jury verdict.[2] On May 22, 1995, within the

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[2] The judgment pronounced that:

> 1. Plaintiffs' complaint and causes of action against defendant Sherri Arnold are dismissed with prejudice.
>
> 2. Plaintiffs' complaint and causes of action against defendant City of Fargo are dismissed with prejudice.

statutory time limit of ten days, the plaintiffs moved, pursuant to Rules 59(a) and 59(c), for a new trial limited to the issue of the plaintiffs' damages and further moved the court to alter the judgment accordingly. In the conclusion to a memorandum attached to their motion, the plaintiffs asked the court to grant a new trial and/or amend the judgment as follows: "1) Grant summary judgment on liability against all defendants and conduct a new trial limited to the issue of damages; 2) If the Court is still persuaded that a fact issue remains, grant a new trial on liability and damages as to Defendants Arnold and the City of Fargo, and limited to damages against Defendant Niemann." Jt. App. at 152. On August 14, 1995, the district court denied this motion for new trial stating as follows: "Plaintiffs' motion for a new trial on damage issues only (doc. #77) is denied." Jt. App. at 157.[3] No further action occurred in the case until September 27,

---

> 3. The third and fourth causes of action set forth in plaintiffs' complaint against defendant Kevin Niemann are dismissed with prejudice [state law claims for malicious prosecution and false arrest/false imprisonment].
>
> 4. Judgment is entered in favor of plaintiff Gilbert Copper and against defendant Kevin Niemann in the amount of $1 awarded by the jury on plaintiff's first and second causes of action, with post-judgment interest.
>
> 5. Judgment is entered in favor of plaintiff Adele Norberg and against defendant Kevin Niemann in the amount of $1 awarded by the jury on plaintiff's first and second causes of action, with post-judgment interest.

Jt. App. at 147-148.

[3] Doc. #77 is the plaintiffs' motion for new trial.

1995, when the clerk's minutes reflect a status conference and discussion of possible new trial dates.

On April 10, 1997, the district court determined that the City of Fargo's 1985 home picketing ordinance was unconstitutional as a content-based restriction on free speech under this court's decision in Kirkeby v. Furness, 92 F.3d 655 (8th Cir. 1996). The district court therefore granted summary judgment on liability against the City and granted summary judgment dismissing defendant Niemann from the action. Thereafter, on August 21, 1997, a second jury trial occurred in which the jury awarded damages in the amount of $1,000.00 in favor of Copper and $1,150.00 in favor of Norberg solely against the City of Fargo. From a judgment entered on September 18, 1997 and the award of attorneys' fees on March 31, 1998, the City brings this appeal.[4]

II. DISCUSSION

The district court did not have jurisdiction to conduct a second trial in this case because it never entered an order granting a new trial. Rule 59 of the Federal Rules of Civil Procedure requires a party to move for a new trial within ten days after judgment. Rule 59 further provides:

> **(d) On Court's Initiative; Notice; Specifying Grounds.** No later than 10 days after entry of

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[4] The plaintiffs have also filed a cross-appeal seeking a new trial against Officer Niemann, as well as Officer Arnold, and seeking punitive damages against them. In light of our disposition of this case determining that the first trial resulted in the final judgment, we will not address those issues and they are now moot.

> judgment the court, on its own, may order a new trial for any reason that would justify granting one on a party's motion. After giving the parties notice and an opportunity to be heard, the court may grant a timely motion for a new trial for a reason not stated in the motion. When granting a new trial on its own initiative or for a reason not stated in a motion, the court shall specify the grounds in its order.

The district court denied the plaintiffs' motion for a new trial on August 14, 1995, and never issued an order granting a new trial on all issues. Notwithstanding that no order granting a new trial on all issues exists, the plaintiffs contend that language in the August 14, 1995 order combined with language in the district court's previous orders demonstrate that the court implicitly granted a new trial on the court's own initiative. This argument fails because a district court cannot implicitly grant a new trial under Rule 59. Instead, if a district court denies a party's motion for a new trial, the district court must specify other grounds for a new trial in an order under Rule 59 if it decides on its own initiative to grant a new trial. See Central Microfilm Serv. v. Basic/Four Corp., 688 F.2d 1206 (8th Cir. 1982). This court stated as follows:

> When a party has timely moved for a new trial but the court orders such relief on a ground not raised in the motion, the court is deemed to have acted on its own initiative. Under Rule 59, however, the court has authority to act outside the ten-day limit in this circumstance, provided it gives the parties notice and an opportunity to

> be heard and specifies the grounds on which it grants the new trial.

Id. at 1211 (citing Wright & Miller, Fed. Prac.& Proc. § 2813). In this case, the district court never did issue an order granting a new trial and, therefore, did not specify grounds for a new trial as would be required by Rule 59.

That the parties and the district court continued with proceedings subsequent to the final judgment in this case does not constitute a waiver of the requirements of the Federal Rules of Civil Procedure. The district court lost jurisdiction to further litigate this case. The district court and the parties cannot waive the requirements of Rule 59. See Nugent v. Yellow Cab. Co., 295 F.2d 794 (7th Cir. 1961).

The plaintiffs further argue that the district court's order of August 14, 1995 does not constitute a final appealable order due to noncompliance with Rule 58 of the Federal Rules of Civil Procedure. Rule 58 requires for entry of a final judgment, the entry of a separate document, and notation in the docket by the district court clerk. The plaintiffs' argument fails because the denial of a motion for a new trial leaving the old judgment unaffected does not fall under Rule 58. See Marre v. United States, 38 F.3d 823, 825 (5th Cir. 1994). The district court is not required to issue a new judgment or enter a separate written order. Id. On May 10, 1995, the district court signed a document entitled "Judgment" and the Clerk of the United States District Court of the District of North Dakota entered the "Notice of Entry of Judgment" that same day. Thus, the district court followed the requirements of Rule 58.

Alternatively, the plaintiffs contend there exists no final appealable order because the issues raised in the new trial motion were still pending. See Washington v. Confederated Tribes, 447 U.S. 134, 149-50 (1980). A non-final order would deprive this court of jurisdiction under 28 U.S.C. § 1291. Specifically, the plaintiffs assert that the district court failed to address their second request in their memorandum for "a new trial on liability and damages as to Defendants Arnold and the City of Fargo, and limited to damages against Defendant Niemann." Jt. App. at 152. However, on its face the August 14, 1995 order did not leave any issues unresolved. As previously stated, the order denied the plaintiffs' motion for a new trial on the issue of damages only. The order also stated that the district court would not "alter the judgment entered in this case according to plaintiffs' suggestions." Jt. App. at 156.

During oral argument, the plaintiffs also referred to Rule 60(a) of the Federal Rules of Civil Procedure which reads as follows:

> **(a) Clerical Mistakes.** Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.

Fed. R.Civ. P. 60(a). We reject the plaintiffs' contention that the jurisdictional problem in this case can be remedied by classifying it as a clerical mistake. This is not a clerical mistake in a judgment or order. The district court simply did not issue an order for a new trial.

Accordingly, we find no merit and no case law which supports the plaintiffs' suggestions that the second trial comes within the jurisdiction of the district court. Therefore, we enforce the judgment rendered at the conclusion of the first trial. Moreover, because of the change in judgment, we remand this case to the district court to modify the attorneys' fees awarded. The plaintiffs, as the prevailing party in the first jury trial, are entitled to attorneys' fees. However, on remand the district court must determine the appropriate amount of attorneys' fees in light of the damages awarded by the first jury verdict. See Farrar v. Hobby, 506 U.S. 103 (1992). Each party is responsible for their own fees and costs on appeal.

III. CONCLUSION

We conclude that the district court lacked jurisdiction to proceed with a second trial because the record indicates no order granting a new trial as required by Rule 59. We, therefore, reverse the entry of the second judgment and the initial judgment of May 10, 1995 stands. We remand for a determination and award of appropriate attorneys' fees.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX B — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHT CIRCUIT FILED AUGUST 24, 1999

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

Nos. 98-2144/2416

Gilbert Copper, Adele Norberg,

Cross-Appellants/Appellees,

v.

City of Fargo,

Appellant/Cross-Appellee,

Sherri Arnold, Kevin Niemann,

Defendants.

Order Denying Petition for Rehearing
and for Rehearing En Banc.

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

August 24, 1999

Order entered at the Direction of the Court:

Michael E. Gans
Clerk, U.S. Court of Appeals, Eighth Circuit

APPENDIX C—CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution

Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Amendment IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Federal Statutes

42 U.S.C. §1983: Civil Action for Deprivation of Rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proceeding for redress. For purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

(R.S. §1979; Dec. 29, 1979, P.L. 96-170, §1, 93 Stat. 1284)

Federal Rules

Federal Rules of Civil Procedure

Rule 54. Judgments; Costs

(a) Definition; Form. "Judgment" as used in these rules includes a decree and any order from which an appeal lies. A judgment shall not contain a recital of pleadings, the report of a master, or the record of prior proceedings.

. . .

(As amended Dec. 27, 1946, eff. Mar. 19, 1948; Apr. 17, 1961, eff. July 19, 1961; Mar. 2, 1987, eff. Aug. 1, 1987; Apr. 22, 1993, eff. Dec. 1, 1993)

ADVISORY COMMITTEE NOTES

1937 Adoption

Note to Subdivision (a). The second sentence is derived substantially from [former] Equity Rule 71 (Form of Decree).

Rule 58. Entry of Judgment

Subject to the provisions of Rule 54(b): (1) upon a general verdict of a jury, or upon a decision by the court that a party shall recover only a sum certain or costs or that all relief shall be denied, the clerk, unless the court otherwise orders, shall forthwith prepare, sign, and enter the judgment without awaiting any direction by the court; (2) upon a decision by the court granting other relief, or upon a special verdict or a general verdict accompanied by answers to interrogatories, the court shall promptly approve the form of the judgment, and the clerk shall thereupon enter it. Every judgment shall be set forth on a separate document. A judgment is effective only when so set forth and when entered as provided in Rule 79(a). Entry of the judgment shall not be delayed, nor the time for appeal extended, in order to tax costs or award fees, except that, when a timely motion for attorneys' fees is made under Rule 54(d)(2), the court, before a notice of appeal has been filed and has become effective, may order that the motion have the same effect under Rule 4(a)(4) of the Federal Rules of Appellate Procedure as a timely motion under Rule 59. Attorneys shall not submit forms of judgment except upon the direction of the court, and these directions shall not be given as a matter of course. (As amended Dec. 27, 1946, eff. Mar. 19, 1948; Jan. 21, 1963, eff. July 1, 1963; Apr. 22, 1993, eff. Dec. 1, 1993.)

ADVISORY COMMITTEE NOTES

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1963 Amendment

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Hitherto some difficulty has arisen, chiefly where the court has written an opinion or memorandum containing some apparently directive or dispositive words, e.g., "the plaintiff's motion [for summary judgment] is granted," see *United States v F. & M. Schaefer Brewing Co.* 356 U.S. 227, 229, 78 S.Ct. 674, 2 L.Ed.2d 721 (1958). Clerks on occasion have viewed these opinions or memoranda as being in themselves a sufficient basis for entering judgment in the civil docket as provided by Rule 79(a). However, where the opinion or memorandum has not contained all the elements of a judgment, or where the judge has later signed a formal judgment, it has become a matter of doubt whether the purported entry of judgment was effective, starting the time running for post-verdict motions and for the purpose of appeal. See *id.*; and compare *Blanchard v Commonwealth Oil Co.*, 294 F2d 834 (5th Cir. 1961); *United States v Higginson*, 238 F2d 439 (1st Cir. 1956); *Danzig v Virgin Isle Hotel, Inc.*, 278 F2d 580 (3d Cir. 1960); *Sears v Austin*, 282 F2d 340 (9th Cir. 1960), with *Matteson v United States*, *supra*; *Erstling v Southern Bell Tel. & Tel. Co.*, 255 F2d 93 (5th Cir. 1958); *Barta v Oglala Sioux Tribe*, 259 F2d 553 (8th Cir. 1958), cert denied 358 U.S. 932, 79 S.Ct. 320, 3 L.Ed.2d 304 (1959); *Beacon Fed. S. & L. Assn. v Federal Home L. Bank Bd.*, 266 F2d 246 (7th Cir. 1959), cert denied 361 U.S. 823, 80 S.Ct. 70, 4 L.Ed.2d 67 (1959); *Ram v Paramount Film D. Corp.*, 278 F2d 191 (4th Cir. 1960).

The amended rule eliminates these uncertainties by requiring that there be a judgment set out on a separate document--distinct from any opinion or memorandum--which provides the basis for the entry of judgment. That judgments shall be on separate documents is also indicated in Rule 79(b); and see General Rule 10 of the U. S. District Courts for the Eastern and Southern Districts of New York; *Ram v Paramount Film D. Corp.*, *supra*, at 194.

See the amendment of Rule 79(a) and the new specimen forms of judgment, Forms 31 and 32.

See also Rule 55(b) and (2) covering the subject of judgments by default.

. . . . . .

Federal Rules of Appellate Procedure

Rule 4. Appeal as of Right—when Taken

(a) Appeal in a Civil Case.

(1) Time for Filing a Notice of Appeal.

(A) In a civil case, except as provided in rules 4(a)(1)(B), 4(a)(4), and 4(c), the notice of appeal required by Rule 3 must be filed with the district clerk within 30 days after the judgment or order appealed from is entered.

(B) When the United States or its officer or agency is a party, the notice of appeal may be filed by any party within 60 days after the judgment or order appealed from is entered.

(2) Filing Before Entry of Judgment. A notice of appeal filed after the court announces a decision or order—but before the entry of the judgment or order—is treated as filed on the date of and after the entry.

(3) Multiple Appeals. If one party timely files a notice of appeal, any other party may file a notice of appeal within 14 days after the date when the first notice was filed, or within the time otherwise prescribed by this Rule 4(a), whichever period ends later.

(4) Effect of a Motion on a Notice of Appeal.

(A) If a party timely files in the district court any of the following motions under the Federal Rules of Civil Procedure, the time to file an appeal runs for all parties from

the entry of the order disposing of the last such remaining motion:

(i) for judgment under Rule 50(b);

(ii) to amend or make additional factual findings under rule 52(b), whether or not granting the motion would alter the judgment;

(iii) for attorney's fees under Rule 54 if the district court extends the time to appeal under Rule 58;

(iv) to alter or amend the judgment under Rule 59;

(v) for a new trial under Rule 59; or

(vi) for relief under Rule 60 if the motion is filed no later than 10 days (computed using Federal rule of civil procedure 6(a)) after the judgment is entered.

(B)(i) If a party files a notice of appeal after the court announces or enters a judgment—but before it disposes of any motion listed in Rule 4(a)(4)(A)—the notice becomes effective to appeal a judgment or order, in whole or in part, when the order disposing of the last such remaining motion is entered.

(ii) A party intending to challenge an order disposing of any motion listed in Rule 4(a)(4)(A), or a judgment altered or amended upon such a motion, must file a notice of appeal, or an amended notice of appeal—in compliance with Rule 3(c)—within the time prescribed by this Rule measured from the entry of the order disposing of the last such remaining motion.

(iii) No additional fee is required to file an amended notice.

. . . . . .

(7) Entry Defined. A judgment or order is entered for purposes of this Rule 4(a) when it is entered in compliance with Rules 58 and 79(a) of the Federal Rules of Civil Procedure.

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ADVISORY COMMITTEE NOTES

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1979 Amendment

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Subdivision (a)(6). The proposed amendment would call attention to the requirement of Rule 58 of the F.R.C.P. (Federal Rules of Civil Procedure) that the judgment constitute a separate document. See United states v. Indrelunas, 411 U.S. 216 (1973). when a notice of appeal is filed, the clerk should ascertain whether any judgment designated therein has been entered in compliance with Rules 58 and 79(a) and if not, so advise al parties and the district judge. While the requirement of Rule 48 [sic] is not jurisdicitonal. (see *Bankers Trust Co. v. Mallis*, 431 U.S. 928 (1977))[sic], compliance is important since the time for the filing of a notice of appeal by other parties is measured by the time at which the judgment is properly entered.

. . . . . .

Municipal Ordinances

City of Fargo Residential Picketing Ordinance enacted January 28, 1985.

ARTICLE 10-08 PICKETING

10-0801. Definitions.--For purposes of this article, certain words and phrases used herein are defined as follows:

A. "Dwelling" means any structure or building, or dwelling unit within a building, which is used as a place of residence.

B. "Picketing" means the practice of standing, marching or patrolling by one or more persons inside of, in front, or about any premises for the purpose of persuading an occupant of such premises or to protest some action, attitude or belief.

10-0802. Picketing of dwellings prohibited.--No person shall engage in picketing the dwelling of any individual in the City of Fargo.

APPENDIX D — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NORTH DAKOTA FILED APRIL 11, 1995

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
SOUTHEASTERN DIVISION

Gilbert Copper and Adele Norberg,

Plaintiffs,

vs. Civil No. A3-93-130

City of Fargo and Kevin Niemann,

Defendants.

NOTICE OF INTENT TO GRANT A NEW TRIAL

Pursuant to Rule 59 of the Federal Rules of Civil Procedure, this "court of its own initiative may order a new trial for any reason for which it might have granted a new trial on motion of a party," providing that it does so within ten days after entry of judgment. Fed. R. Civ. Pro. 59 (d). "Rule 59 of the Federal Rules of Civil Procedure allows a trial court to order a new trial where necessary to insure that all parties receive a just and fair determination of the issues presented." Brown v. Royalty, 535 F.2d 1024, 1027 (8th Cir. 1976). Furthermore, the Eighth Circuit Court of Appeals has determined that a court may grant a new trial when its instructions to the jury, taken as a whole, do not fairly and adequately submit the issues to the jury or set forth the

applicable law and thus prejudicially affect the verdict. See Laubach v. Otis Elevator Co., 37 F.3d 427, 429 (Sth Cir. 1994); Sherrill v. Royal Industries, Inc., 526 F.2d 507 (8th Cir. 1975). The Eighth Circuit has also ruled that courts are free to grant a new trial when statements made during closing argument are plainly unwarranted and clearly injurious. Griffin v. Hilke, 804 F.2d 1052, 1057 (8th Cir. 1986); Vanskike v. Union Pacific R. Co., 725 F.2d 1146, 1149 (8th Cir. 1984) (citing Homan v. United States, 279 F.2d 767 (8th Cir. 1960)).

On January 10-13, 1995, the single remaining fact issue in the above entitled case was tried to an eight-person jury.[1] At the close of evidence, the court instructed the jury about the sole issue in this matter and the law it should apply in reaching a verdict. The court's instructions included the following:

> INSTRUCTION NO. 20
> **Mitigation of Damages**
>
> A person who claims damages resulting from the wrongful act of another has a duty under the law to use reasonable diligence to mitigate--to avoid or minimize those damages.

---

[1] The issue the jury was asked to decide was whether defendant Officer Kevin Niemann was aware, at the time of plaintiffs' arrest, that plaintiffs had been walking a picketing route extending down the block beyond the Gifford residence or whether Officer Niemann reasonably believed that plaintiffs had been demonstrating solely in front of the Gifford residence.

> If you find the defendants are liable and the plaintiffs have suffered damages, the plaintiffs may not recover for any item of damage which they could have avoided through reasonable effort. If you find by a preponderance of the evidence that the plaintiffs reasonably failed to take advantage of an opportunity to lessen their damages, you should deny them recovery for those damages which they would have avoided had they taken advantage of the opportunity.
>
> You are the sole judge of whether the plaintiffs acted reasonably in avoiding or minimizing their damages. Injured plaintiffs may not sit idly by when presented with an opportunity to reduce their damages. However, they are not required to exercise unreasonable efforts or incur unreasonable expenses in mitigating the damages. The defendants have the burden of proving the damages which the plaintiffs could have mitigated. In deciding whether to reduce the plaintiffs' damages because of their failure to mitigate, you must weigh all the evidence in light of the particular circumstances of the case, using sound discretion in deciding whether the defendants have satisfied their burden of proving that the plaintiffs' conduct was not reasonable.

Upon review of the proceedings in this matter, the court finds that this instruction may have misled the jury about the scope of the plaintiffs' obligation to avoid or minimize their

damages. See Miller v. Lovett, 879 F.2d 1066, 1070-71 (2nd Cir. 1989).

> A properly phrased mitigation charge should limit the jury's consideration to what the plaintiff did or should have done after being injured. It focuses on the plaintiff's duty "to prevent the aggravation" of injuries already received and "to effect a recovery from such injuries." There can be no duty to mitigate damages until the injury causing those damages actually occurs.
>
> . . .
>
> If a plaintiff's duty to mitigate damages were to include the duty to avoid the underlying injury, few arrestees could recover damages under § 1983 since most could have "avoided" engaging in the conduct that precipitated the arrest.

Id. (emphasis in original) (citations omitted). The court is concerned that the mitigation of damages instruction above may have created the erroneous impression that plaintiffs could have mitigated their damages by leaving the scene of the demonstration when Officer Niemann asked them to do so. This concern is due in part to the language in the instruction and in part to defendants' application of this instruction in their closing argument.

In their closing argument, defendants noted that Officer Niemann asked plaintiffs to leave the area and then warned them that if they did not go home they would be arrested for violating the Fargo antipicketing ordinance. Defendants then contended that plaintiffs would not have been arrested if they

had heeded these warnings. Additionally, defendants argued that by refusing to leave the scene of the demonstration when asked to do so, plaintiffs reasonably failed to take advantage of an opportunity to lessen their damages; and therefore, pursuant to the court's mitigation of damages instruction, the jury should deny plaintiffs recovery for those damages which they would have avoided had they complied with Niemann's request to leave the area.

The United States Supreme Court in Frisby v. Schultz, 487 U.S. 474, 479-81 (1988), ruled that picketers have a First Amendment right to demonstrate on public streets and sidewalks in a residential neighborhood and this court concluded that plaintiffs were lawfully exercising this constitutional right on August 20, 1991, when they participated in a demonstration near the Gifford residence. Consequently, defendant Niemann had no right to request plaintiffs to leave the demonstration area or to arrest plaintiffs when they failed to do so. Informing the jury that it should deny plaintiffs recovery for damages plaintiffs would have avoided if they had complied with Niemann's request to leave the scene of the demonstration clearly implied that Niemann's actions were appropriate and that plaintiffs had a duty to avoid the arrest. It is very likely that this implication unfairly influenced the jury's decision on the question of liability as well as damages. Accordingly, the court finds that the mitigation of damages instruction in combination with defendants' closing argument were clearly injurious to plaintiffs' case and so prejudicial as to warrant retrial of both the liability and damages issues presented at the first trial. The court will schedule the case for retrial unless the parties elect not to proceed with that option.

IT IS ORDERED that:

The court finds that there are grounds for a new trial and will order a new trial on all issues presented at the first trial unless the parties elect to decline the opportunity to retry the case. The parties shall advise the court in writing by May 1, 1995 whether or not they wish to proceed with a new trial. Entry of judgment will be deferred until that date.

Dated: April 11, 1995

Karen K. Klein
United States Magistrate Judge

APPENDIX E — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NORTH DAKOTA FILED MAY 1, 1995

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
SOUTHEASTERN DIVISION

Gilbert Copper and Adele Norberg,

Plaintiffs,

vs. Civil No. A3-93-130

City of Fargo and Kevin Niemann,

Defendants.

CLARIFICATION OF NOTICE OF INTENT TO GRANT NEW TRIAL

Plaintiffs have responded to the court's April 11, 1995 notice of intent to grant new trial by raising a question about the intended scope of the new trial. Specifically, plaintiffs inquire whether the court intends to retry the issue of liability against the City of Fargo.

In its notice of intent, the court indicated it intended to grant a new trial as to all issues presented in the first trial. The new trial would encompass both the fact issue as to liability and damage issues involving both Kevin Niemann and the City of Fargo.

Plaintiffs indicate they do not wish to reopen the issue of liability against defendant Niemann and intend instead to move for a new trial limited to damages against defendant Niemann and both liability and damages against the City of Fargo. The court will afford plaintiffs an opportunity to present such a motion, but the court questions the propriety of retrying the identical fact issue against one defendant but not the other.

The court recognizes that because of differing burdens of proof, the issue was presented to the jury in a separate interrogatory as to each defendant, but the issue is nonetheless the same. The court has already expressed its concern that the error regarding the mitigation of damages instruction affected the jury's consideration not only of the damages issues in the case, but the liability issues as well. Under the circumstances, it cannot be said that the error potentially influenced the jury's consideration of the evidence against one defendant but not the other. The court will, however, afford plaintiffs an opportunity to preserve their position in the record and will consider any argument they may have regarding not retrying liability of defendant Niemann.

To expedite the retrial matter, the court directs, that the parties have until May 20, 1995 to respond to the court's notice of intent to grant new trial, as clarified herein, as well as to file any motions for new trial on different terms than indicated by the court in its notice. Judgment will be entered on the jury's verdict on May 10, 1995.

The clerk is directed to serve this notice upon counsel for the parties by facsimile transmission.

IT IS SO ORDERED.

Dated: May 1, 1995.

Karen K. Klein
United States Magistrate Judge

APPENDIX F — JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NORTH DAKOTA FILED MAY 10, 1995

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
SOUTHEASTERN DIVISION

Gilbert Copper and Adele Norberg,

Plaintiffs,

vs. Civil No. A3-93-130

City of Fargo and Kevin Niemann,

Defendants.

JUDGMENT

Pursuant to this court's summary judgment ruling and the verdict rendered by the jury in this case, it is **ADJUDGED AND DECREED**:

1. Plaintiffs' complaint and causes of action against defendant Sherri Arnold are dismissed with prejudice.

2. Plaintiffs' complaint and causes of action against defendant City of Fargo are dismissed with prejudice.

3. The third and fourth causes of action set forth in plaintiffs' complaint against defendant Kevin Niemann are dismissed with prejudice.

4. Judgment is entered in favor of plaintiff Gilbert Copper and against defendant Kevin Niemann in the amount of $1 awarded by the jury on plaintiff's first and second causes of action, with post-judgment interest.

5. Judgment is entered in favor of plaintiff Adele Norberg and against defendant Kevin Niemann in the amount of $1 awarded by the jury on plaintiff's first and second causes of action, with post-judgment interest.

Dated: May 10, 1995

Karen K. Klein
United States Magistrate Judge

APPENDIX G — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NORTH DAKOTA FILED AUGUST 14, 1995

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
SOUTHEASTERN DIVISION

Gilbert Copper and Adele Norberg,

Plaintiffs,

vs. Civil No. A3-93-130

City of Fargo and Kevin Niemann,

Defendants.

ORDER

There are several pending motions filed by plaintiffs relating to post-trial matters.

Motion for New Trial/Alter Judgment

On May 22, 1995, plaintiffs filed a motion for a new trial on the issue of damages only and a motion to alter the judgment entered by this court. Plaintiff argues that liability and damages are distinct issues and that this court should reverse its decision to grant a new trial on both the liability and damages issues presented at the first trial. Instead, plaintiff urges this court to grant a new trial on the issue of damages only.

This court has previously considered plaintiffs' request for a new trial on the issue of damages only and determined that the mitigation of damages instruction may have unfairly influenced the jury's decision on the question of liability as well as damages. The court is not persuaded that its decision was erroneous. Accordingly, plaintiffs' motion for a new trial on the issue of damages only is denied.

Plaintiffs also request this court to review its summary judgment rulings.

Specifically, plaintiffs argue that the court erred in ruling that the defendant police officers are entitled to qualified immunity.[1] In support of their argument, plaintiffs contend

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[1] Although this court ruled that defendant Officer Sherri Arnold was entitled to qualified immunity, it did NOT rule that defendant Officer Niemann was entitled to qualified immunity. To the contrary, the court found that it could not rule on the question of qualified immunity with respect to defendant Niemann because the court found that the evidence submitted presented a genuine factual dispute requiring a jury to assess the credibility of witnesses and resolve inconsistencies in the evidence. At the trial, the jury found that Officer Niemann failed to meet his burden of proving his affirmative defense. Accordingly, the court entered judgment against Niemann, thereby denying his request for qualified immunity from damages.

In its December 30, 1994 summary judgment ruling, this court discussed plaintiffs' claim that the officers had a duty to investigate further before making arrests. In rejecting the claim, the court stated that

> the court finds that if the jury is persuaded by Niemann's version of the events, then a reasonable officer could have found that there was probable cause to arrest the protestors.

that this court found that "there was not probable cause for the arrest of the plaintiffs." Pls.' Mot. for a New Trial and To Alter Judgment, at 7). Plaintiffs are mistaken. The court did not specifically decide whether there was probable cause to arrest plaintiffs.

This court has reviewed plaintiffs' other arguments and found them unpersuasive.[2] Consequently, this court declines plaintiffs' invitation to conduct another review of all liability

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> Conversely, if the jury is persuaded that Niemann possessed information about the scope and distance of the picketers' demonstration route before he made the arrest, then, viewing the facts in the light most favorable to the plaintiffs, the court concludes that a reasonable officer could not have believed the arrest was lawful.

Order of December 30, 1994, at 34-35.

The jury found that Niemann failed to prove he did not know the extent of the picketing route. Therefore, there is no finding that Niemann acted as a reasonable police officer in deciding to arrest plaintiffs. In light of the jury's finding, any claimed duty to investigate further and the court's earlier discussion of the issue have lost their relevance.

[2] Specifically, the court declines to reconsider its holding that Officer Sherri Arnold is entitled to qualified immunity because plaintiffs' present argument is based on an erroneous factual premise that Officer Arnold learned about the extent of the picketing route in her squad car as she was driving the female picketers to the jail.

As to the City of Fargo, the court again rejects plaintiffs' argument that the city's admission that the police officers acted "pursuant to" the policies, customs, practices, procedures and training when Niemann arrested plaintiffs, based on the nonexistence of any policy or procedure relating to residential picketers.

issues and to alter the judgment entered in this case according to plaintiffs' suggestions.

Motion to File Reply Brief

The court has considered plaintiffs' reply brief and hereby grants leave to file the brief.

Motion for Extension of Time to Submit Application for Attorneys' Fees

Plaintiffs seek an extension of time to apply for an award of attorneys' fees until 20 days after entry of final judgment on their motion for new trial. Judgment has already been entered on the jury's verdict. The court has ordered a new trial on terms different than those requested by plaintiffs. Plaintiffs are granted an extension until 20 days after entry of any judgment following retrial to file an application for attorneys' fees.

Motion to Strike Juror Affidavit

Plaintiffs move to strike an affidavit of a juror filed by defendants. The affidavit is improper under Federal Rule of Evidence 606(b). Plaintiffs' motion is granted.

IT IS ORDERED:

1. Plaintiffs' motion for a new trial on damages issues only (doc. #77) is denied.

2. Plaintiffs' motion for leave to file a reply brief (doc. #83) is granted.

3. Plaintiffs' motion to extend time for application of attorney fees (doc. #78) is granted.

4. Plaintiffs' motion to strike juror affidavit (doc. # 79) is granted.

Dated: August 14, 1995

Karen K. Klein
United States Magistrate Judge

APPENDIX H — AMENDED JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NORTH DAKOTA ENTERED MARCH 31, 1998

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
SOUTHEASTERN DIVISION

Gilbert Copper and Adele Norberg,

Plaintiffs,

vs. Civil No. A3-93-130

City of Fargo and Kevin Niemann,

Defendants.

JUDGMENT IN A CIVIL CASE

Jury Verdict. Following an order for summary judgment in favor of plaintiffs on the issue of liability, this action came before the Court for a trial by jury on the issue of damages. The jury has rendered its verdict.

IT IS ORDERED AND ADJUDGED pursuant to the jury verdict entered on August 21, 1997, the plaintiffs are entitled to damages as follows:

Gilbert Copper	$1,000.00
Adele Norberg	$1,150.00

TOTAL JUDGMENT $2,150.00

March 31, 1998: Order Filed and Entered by Magistrate Judge Klein awarding attys' fees: $67,305 & costs: $2,097.94 – TOTAL JUDGMENT: $71,552.94

Dated: September 8, 1997

Edward J. Klecker
Clerk

by Deputy Clerk — Shelley M. Giauque